

## RECENT DEVELOPMENTS

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### ***U.S. Trade Law and Policy Series No. 15*** **Anticircumvention Measures: Shifting the Gears of the Antidumping and Countervailing Duty Laws?**

The Omnibus Trade and competitiveness Act of 1988 (1988 Trade Act or Trade Act) amended the antidumping and countervailing duty laws extensively but, for the most part, not very significantly. These twenty-five amendments pale in their commercial or legal significance compared to the jugular amendments that had been approved by either the House of Representatives<sup>1</sup> or the Senate,<sup>2</sup> but rejected in the House-Senate conference that resolved differences between the two bills.<sup>3</sup>

Nevertheless, one amendment merits close scrutiny in its application. Alone among the antidumping and countervailing duty amendments, the anticircum-

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1. *E.g.*, establishing a private right of action, H.R. 3, 100th Cong., 1st Sess. § 166 (1987).

2. *E.g.*, exporter's sales price offset, S. 1420, 100th Cong., 1st Sess. § 339 (1987); *see* 133 CONG. REC. S8982-89 (daily ed. June 30, 1987).

3. H. R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 515 (1988) [hereinafter CONFERENCE REPORT].

vention provision has the potential—in our opinion, unlikely to be realized—to not only grease, but shift the gears of these laws, the centerpiece of U.S. import remedies.

Application of the anticircumvention measures could exacerbate the constructive tension that already exists between the Department of Commerce's (Commerce) determination of "class or kind of merchandise" in defining the scope of its investigation and the International Trade Commission's (ITC) determination of "like product" and "industry" in deciding whether dumped or subsidized imports cause or threaten material injury to a U.S. industry.

This article reviews the anticircumvention provisions and traces their legislative history. It then explores their likely effect on the interface between the two agencies administering the antidumping and countervailing duty laws. Finally, it highlights developments in their application to date and speculates as to their potential significance in this evolving area.

## I. The Anticircumvention Provisions of the 1988 Trade Act

Section 1321 of the 1988 Trade Act further amended title VII of the Tariff Act of 1930 (Tariff Act) by adding section 781, "Prevention of Circumvention of Antidumping and Countervailing Duty Orders."<sup>4</sup> Section 781 contains four separate provisions intended to prevent the evasion or circumvention of antidumping and countervailing duty orders or antidumping findings (orders).<sup>5</sup> An order requires an importer to post a cash deposit (equal to the antidumping (AD) or countervailing duty (CVD) rate found in the investigation) on imports of the class or kind of merchandise covered by the order.<sup>6</sup> The class or kind of

4. Section 781 of the Tariff Act, *as amended by the 1988 Trade Act*, Pub. L. No. 100-418, § 1321, 102 Stat. 1107, 1192-95 (codified as amended at 19 U.S.C. § 1677j).

5. An antidumping finding is authorized under the Antidumping Act of 1921. Antidumping duty orders are issued pursuant to section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673, after an affirmative finding by Commerce that imports are being sold at less than "fair value" (dumped), and an affirmative finding by the ITC that a U.S. industry is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded in the United States, by reason of the dumped imports. Pursuant to section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671, countervailing duty orders are issued when Commerce finds that a foreign government is providing subsidies to production on exports of the subject merchandise and, where required, when the ITC determines that a U.S. industry is materially injured or threatened with material injury by reason of the subsidized imports. In countervailing duty investigations, an injury determination is required if the country subject to the investigation: (i) is a signatory to the Subsidies Code of the General Agreement on Tariffs and Trade (GATT), Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of GATT, 31 U.S.T. 513, T.I.A.S. No. 9619; (ii) has undertaken substantially equivalent obligations; or (iii) concluded a treaty of Friendship, Commerce and Navigation prior to June 19, 1979, that required most-favored-nation treatment. Countries not classified in these three categories may receive an injury determination if the country is a signatory to the GATT and the merchandise subject to investigation enters the United States duty-free.

6. Actual assessment of duty liability is made during the course of administrative reviews under section 751 of the Tariff Act, as amended, 19 U.S.C. § 1675. An administrative review may be requested one year after the issuance of the order and should be completed one year after the request

merchandise is usually defined by the U.S. industry filing the AD or CVD petition and refined by Commerce during the course of the investigation. In a separate but tandem investigation, the ITC must determine whether a U.S. industry producing a "like product" is injured by reason of imports found by Commerce to be dumped or subsidized. When the ITC final decision on the like product does not coincide with Commerce's decision on the class or kind of merchandise, the scope of the order issued by Commerce at the close of both agencies' investigations can be no broader than the like product on which the ITC made an affirmative finding of injury (the interface between the Commerce and ITC scope determinations is discussed below).

An order is intended to provide effective and continuing relief to the U.S. producers of the class or kind of merchandise from the unfair trade practices of foreign companies (in antidumping investigations) or governments (in countervailing duty investigations). However, a minor shift in the pattern of trade or production, whether intentional or merely a response to a changing global marketplace, can render a product outside the scope of an order. Given that trade and production are dynamic, the scope of an order cannot, of necessity, be static. To preclude foreign competitors from circumventing an order by shifting their pattern of trade or production, section 781 includes four provisions authorizing Commerce to clarify the scope and reach of an order.

(1) *Merchandise Completed or Assembled in the United States*

Section 781(a) gives Commerce discretionary authority to include within the scope of an order imported parts and components used to assemble or complete in the United States the merchandise subject to an order.<sup>7</sup> Two conditions must be met in order for Commerce to include parts and components in the scope of an order: (i) the parts and components must be imported from the country that is subject to the order; and (ii) the difference in the value of the finished merchandise sold in the United States (i.e., the original merchandise subject to the order)

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is made. Upon completion of the administrative review, actual duties are assessed on imports entered during the period covered by the administrative review. Thus, the actual duty liability may be greater or lower than the cash deposit the importer is required to make after the order is issued. If Commerce's preliminary determination is affirmative, the actual duty liability of the importer for imports made between the preliminary determination and the issuance of the order can be no greater than the preliminary AD or CVD rate. See 54 Fed. Reg. 12,778-79 (1989) (to be codified at 19 C.F.R. §§ 353.22, 353.23) (AD); 53 Fed. Reg. 52,354-56 (1988) (to be codified at 19 C.F.R. §§ 355.22, 355.23) (CVD).

7. Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1192 (codified as amended at 19 U.S.C. § 1677j). Examples of circumvention of an order through assembly or completion are included in the report issued by the Committee on Ways and Means to accompany H.R. 3 (see *supra* note 1). H. R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1, at 134 (1987) [hereinafter H. R. REP.]. As an example of assembly, the House Report discusses the importation of picture tubes and printed circuit boards which are assembled into television receivers. As an example of completion by means other than assembly, the House Report discusses the importation of steel pipe by a related party that threads it and sells it as threaded pipe.

and the value of the imported parts and components must be “small.”<sup>8</sup> In making its determination whether to include parts and components in the order, Commerce is required to consider the following factors:

- (i) the pattern of trade;
- (ii) whether the manufacturer or exporter of the parts or components in the foreign country subject to an order is related to the person who assembles or completes the merchandise sold in the United States; and
- (iii) whether the imports of the parts or components from the country subject to the order increased after the issuance of the order.

Before making a final decision to include a product, Commerce must notify the ITC of the proposed inclusion and take into account any advice offered by the ITC.

(2) *Merchandise Completed or Assembled in Other Foreign Countries*

Section 781(b) addresses two circumvention situations.<sup>9</sup> The first parallels the anticircumvention issue outlined in section 781(a) above, except that it covers third country (i.e., other foreign country) rather than U.S. assembly and finishing operations on the merchandise covered by the order. The second addresses diversion of a product subject to an order by sending it to a third country for further completion or assembly and then exporting it to the United States. In the second situation, the parts and components that are assembled in the third country are themselves the subject of an order, whereas in the first situation, the finished merchandise that is assembled or completed in the third country, and not the parts and components thereof, is the subject of an order.

Under either situation, the same two conditions set forth in section 781(a) must be met—the value added in the third country must be small, and merchandise (whether parts and components, or finished products) must be from the foreign country subject to the order. Furthermore, the factors to be considered are the same and Commerce is also required to notify the ITC before making a final decision to include the products in question within the scope of the order.

(3) *Minor Alterations of Merchandise*

Unlike the other anticircumvention provisions, section 781(c) measure addresses not only post-order scope decisions, but also scope decisions made during the course of the investigation. Moreover, it is the only anticircumvention provision that does not require consultation with the

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8. H. R. REP., *supra* note 7, at 134; S. REP. NO. 71, 100th Cong., 1st Sess. 100 (1987) [hereinafter S. REP.]. Congress abstained from defining the word “small,” except that it is not to be interpreted as “insignificant.”

9. Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1192-93 (codified as amended at 19 U.S.C. § 1677j).

ITC.<sup>10</sup> In contrast to the other provisions, which require Commerce to decide whether or not certain merchandise is included within the scope of an order, this provision presumptively includes within the scope of the investigation or order merchandise that has undergone minor alterations in form or appearance. The provision specifically includes raw agricultural products that have undergone minor processing. Commerce is authorized to decide that slightly altered merchandise is not within the scope, but the fact that the altered merchandise falls into a different tariff classification than the merchandise already covered by the order is not cause for exclusion.

(4) *Later-Developed Merchandise*

Section 781(d) provides that Commerce can include merchandise developed after the initiation of an investigation in the scope of an order if the later-developed merchandise is essentially the same as the original merchandise subject to the order with regard to general physical characteristics, expectation of ultimate purchasers, ultimate use, channels of trade, and advertisement and display. Any advice provided by the ITC must also be taken into consideration in determining whether later-developed merchandise is within the scope of the order.

The provision specifically prohibits Commerce from excluding later-developed merchandise merely because it falls in a different tariff classification than was identified in the investigation, or because it is capable of additional functions, as long as those functions do not constitute the primary use of the product and do not represent a significant proportion of the total cost of production.

Prior to the enactment of the 1988 Trade Act, Commerce had no specific authority to deal with disagreements about the scope of an order following its issuance. Using its existing authority to determine the class or kind of merchandise, Commerce made scope rulings on whether particular products were covered by the scope of an order.<sup>11</sup> In making these rulings, Commerce relied on the description of the products in the original investigation and, where necessary, four additional criteria: the general physical characteristics of the product; the expectations of the ultimate purchaser; the ultimate use of the merchandise in question; and the channels of trade in which the product moves.<sup>12</sup> While Commerce could not change the scope of an order, it could clarify it.<sup>13</sup>

10. Sections 781(c) and (e) of the Tariff Act, as amended by the 1988 Trade Act, § 1321, 102 Stat. 1193-94 (codified as amended at 19 U.S.C. § 1677j).

11. See, e.g., *Bicycle Speedometers from Japan*, 47 Fed. Reg. 28,978 (Dep't Comm. 1982) (final admin. review); *Portable Electric Typewriters from Japan*, 48 Fed. Reg. 7768 (Dep't Comm. 1983) (final admin. review); 52 Fed. Reg. 1504 (Dep't Comm. 1987) (final admin. review); *Color Television Receivers from Korea*, 52 Fed. Reg. 24,500 (Dep't Comm. 1987) (final admin. review).

12. Kamarck & Harr, *Current Issues Relating to the Scope of Antidumping and Countervailing Duty Orders*, 2 CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES NO. 571, at 33 (PLI 1987).

13. Commerce's post-order scope clarifications have for the most part been upheld by the Court of International Trade. See, e.g., *Goldstar Co. Ltd. v. United States*, 692 F. Supp. 1382 (Ct. Int'l

Both the Administration and Congress recognized, however, that, in order to prevent evasion or circumvention of an order, there was a need to codify Commerce's authority to make post-order scope clarifications.<sup>14</sup> Anticircumvention measures were included in both the House and Senate proposals to amend the antidumping and countervailing duty laws.<sup>15</sup> Moreover, anticircumvention measures were one of the few major antidumping and countervailing duty legislative proposals fully supported by the Administration.<sup>16</sup> The Administration's anticircumvention proposals closely paralleled the House provisions,<sup>17</sup> which were much more stringent than the Senate's provisions. For example, the House measures required the inclusion of parts and components in the order if the value added to the parts and components was small and if the completion and assembly in the United States were performed by a company related to the foreign producer of the parts and components. The Senate, by contrast, gave Commerce discretionary authority to include parts and components.<sup>18</sup> However, it is clear from the committee reports on both bills that the overarching intent of the amendments was to eliminate any loopholes that had been used by foreign competitors to evade an order, thus undermining the effectiveness of the remedies provided by the AD and CVD laws.<sup>19</sup>

The legislation agreed upon in conference differed in several notable ways from the original legislative proposals of Congress and the Administration. For instance, none of the original anticircumvention proposals contained a specific later-developed merchandise provision. The Senate Report on S. 490 discusses

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Trade 1988); *Kyowa Gas Chem. Indus. Co. v. United States*, 582 F. Supp. 887, 7 C.I.T. 311, 5 I.T.R.D. 2431 (Ct. Int'l Trade 1984); *Diversified Prods. Corp. v. United States*, 572 F. Supp. 883, 887-88 (Ct. Int'l Trade 1983); *Royal Business Machs. Inc. v. United States*, 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (CCPA 1982).

14. Anticircumvention measures do not address all possible post-order scope issues that Commerce may encounter. Scope rulings may still be required to clarify for Customs and/or interested parties whether merchandise is included within, or excluded from, the scope of an order. Indeed, the Conference Report notes that none of the provisions in section 781 is intended "to call into question past authority of the Commerce Department to make scope decisions." CONFERENCE REPORT, *supra* note 3, at 601.

15. H. R. 3, 100th Cong., 1st Sess. § 155 (1987); S. 490, 100th Cong., 1st Sess. § 323 (1987).

16. *Comprehensive Trade Legislation, 1987: Hearings on H. R. 3 Before the House Comm. on Ways and Means and its Subcomm. on Trade*, 100th Cong., 1st Sess. 648 (1987) [hereinafter *Hearings on H.R. 3*] (statement of Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, U.S. Dep't Commerce). Mr. Kaplan's testimony outlines the four major AD/CVD amendments supported by the Administration: treatment of non-market economies in antidumping and countervailing duty cases; indirect tax pass-through; preexisting CVD orders on products from countries now entitled to an injury test; and circumvention. These provisions were included in the bill submitted by the President to Congress. S. 636, 100th Cong., 1st Sess. § 208 (1987); H.R. 1155, 100th Cong., 1st Sess. § 5008 (1987).

17. H. R. 1155, 100th Cong., 1st Sess. § 5008(b) (1987); S. 636, 100th Cong., 1st Sess. § 208(b) (1987).

18. S. REP., *supra* note 8, at 99.

19. H.R. REP., *supra* note 7, at 135; S. REP., *supra* note 8, at 100-01.

later developments in the context of minor alterations.<sup>20</sup> A later-developed merchandise provision was added in a Senate amendment and subsequently agreed upon in conference.<sup>21</sup>

Perhaps the most striking change between the legislative proposals and the Trade Act itself is the inclusion of the ITC in the anticircumvention process. None of the legislative proposals mentions the ITC. Moreover, the ITC is not mentioned in the committee reports or in testimony by the Administration on the anticircumvention proposals. Not until the publication of the Conference Report accompanying the legislation is there any written discussion of a role for the ITC. The legislation, as passed, added section 781(e), under which the ITC is authorized to provide advice to Commerce in making its scope determinations under all of the anticircumvention provisions except minor alterations.<sup>22</sup> With respect to the other three provisions, Commerce is required to notify the ITC before making a scope determination so that the ITC may consult with Commerce on relevant injury issues.<sup>23</sup>

Specifically, Commerce must notify the ITC of the proposed inclusion of merchandise in an order. There appear to be two narrow exceptions to the requirement that Commerce must notify the ITC of its proposed inclusion of merchandise within an order under sections 781(a), (b), and (d). The first involves merchandise that is being considered under section 781(a). If parts and components are being considered under this section (completion or assembly in the United States), and if the completion or assembly is deemed by Commerce to be *minor*, ITC notification is apparently not required.<sup>24</sup> The second exception pertains to section 781(d), the later-developed merchandise provision. ITC

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20. S. REP., *supra* note 8, at 100-01. It is interesting to note that the Senate report on the minor alterations provision is also one of the few instances where Commerce is criticized for its scope clarifications. The report states that the primary reason for the provision is to avoid results such as the one reached by Commerce in the Portable Electric Typewriters (PETs) case, in which typewriters with minor alterations (the inclusion of calculator or memory functions) were excluded from the scope of an existing antidumping duty order. The intent of the provision is to prevent foreign producers from circumventing existing orders through the sale of later-developed merchandise or of products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported in the United States at the time of the original investigation. *Id.* at 101. The Court of International Trade overturned Commerce's decision to exclude these typewriters but the foreign respondents have appealed this decision. *See* Smith Corona Corp. v. United States, 706 F. Supp. 908 (Ct. Int'l Trade 1989) (appeal pending) (WESTLAW 89849).

21. S. Amendment No. 365, 133 CONG. REC. S9122-23 (daily ed. July 1, 1987); CONFERENCE REPORT, *supra* note 3, at 515.

22. Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1194-95 (codified as amended at 19 U.S.C. § 1677j).

23. CONFERENCE REPORT *supra* note 3, at 602. The ITC's advisory role is authorized only where there was an injury determination in the proceeding itself. Thus, the ITC has no role in those countervailing duty orders issued pursuant to section 303 of the Tariff Act, 19 U.S.C. § 1303, for which no injury determination was required.

24. Section 781(e) (1) (A) of the Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1194 (codified as amended at 19 U.S.C. § 1677j).

notification is required only with respect to later-developed merchandise incorporating a *significant* technological advance or a *significant* alteration of an earlier product.<sup>25</sup>

After notification, the ITC may request consultations with Commerce, which must be concluded within fifteen days after the date of request. If, after consultations, the ITC considers that the proposed inclusion presents a significant injury issue, it has the option of providing written advice within sixty days after official notification by commerce of the proposed inclusion. The nature of the ITC's advice is whether the inclusion would be inconsistent with the affirmative determination of the ITC on which the order was based. In formulating its advice, the ITC has to consider whether the inclusion of the merchandise in question, taken as a whole, would be consistent with its prior affirmative determination.<sup>26</sup>

Although there is a dearth of information in the legislative history as to how and why the ITC was included, those involved in the legislative process<sup>27</sup> know that it entailed a concern about the GATT legality of the proposed anticircumvention measures.<sup>28</sup> However, it is apparent that Congress intends the ITC's role in anticircumvention decisions to be limited. The Conference Report is replete with statements that the ITC should only intervene when there is a significant injury issue.<sup>29</sup> In fact, the conferees expected that most cases would be handled through informal consultations and that written advice would be the exception, not the rule.<sup>30</sup> These admonitions can only be understood in the context of the interface between Commerce's class or kind determination and the ITC's like product determination.

25. Section 781(e) (1) (C) of the Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1194 (codified as amended at 19 U.S.C. § 1677j).

26. Section 781(e) (3) of the Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1195 (codified as amended at 19 U.S.C. § 1677j).

27. As Deputy U.S. Trade Representative and General Counsel to the U.S. Trade Representative, respectively, Mr. Holmer and Mrs. Bello had overall legal responsibility for the Reagan Administration's coordination with the Congress on the 1988 Trade Act. In particular, this involved ensuring that provisions were not inconsistent with U.S. international obligations.

28. Indeed, the Conference Report states that the purpose of authorizing ITC injury advice is to ensure that any anticircumvention action taken is consistent with U.S. international obligations. CONFERENCE REPORT, *supra* note 3, at 602. The United States is a signatory to the GATT, T.I.A.S. No. 1700, 61 Stat. 5; the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, (the Antidumping Code) 31 U.S.T. 4919, T.I.A.S. No. 9650; and the Subsidies Code, *supra* note 5. Under the Antidumping Code and the Subsidies Code, duties can be assessed only if a like product, which is sold at less than "normal" value or is subsidized, causes or threatens material injury to an established industry or materially retards the establishment of an industry producing the like product. Because the ITC is responsible under U.S. law for determining injury, Congress concluded that it was necessary to include the ITC in the anticircumvention process in order to alleviate any concern that the anticircumvention measures might violate our international obligations.

29. See, e.g., CONFERENCE REPORT, *supra* note 3, at 602-03.

30. *Id.* at 604.



## II. The Interface between Commerce's Class or Kind of Merchandise Determination and ITC's Like Product Determination

Both Commerce and the ITC have a statutorily mandated role in determining whether antidumping or countervailing duties should be levied against imports. In its investigation, Commerce must decide whether imports of a class or kind of merchandise are sold at less than "fair value" (dumped) or are subsidized. The ITC, on the other hand, must determine in its investigation whether a U.S. industry producing a "like product" is injured by reason of the dumped or subsidized imports. Although these two investigations run on separate tracks, with one focusing on the foreign side and the other on the domestic side, they intersect when the scope of each agency's investigation is determined.<sup>31</sup>

In determining the class or kind of merchandise covered by an investigation, Commerce normally relies on the description provided in the petition filed by the U.S. industry. The scope of each investigation encompasses one class or kind of merchandise. Thus, the petitioner usually wants to provide a broad description of the merchandise to be covered so that any resulting order will provide comprehensive relief. However, Commerce must decide whether the merchandise as described in the petition constitutes one, or more than one, class or kind of merchandise.<sup>32</sup> Moreover, the petitioner must take into account the effect its scope definition may have on the ITC's like product determination.

Like product is defined as the "product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to investigation."<sup>33</sup> If the petitioner's (and Commerce's) scope formulation is too broad, the ITC may determine that the merchandise constitutes more than one like product and, by law, a separate injury determination is required for each like product.<sup>34</sup> When the ITC's like product definition parallels Commerce's class or

31. For additional information on both pre- and post-order scope issues in Commerce and ITC investigations, see generally Holmer & Bello, *U.S. Trade Law and Policy Series #9: The Scope of "Class or Kind of Merchandise" in Antidumping and Countervailing Duty Cases*, 20 INT'L LAW. 1015 (1986); Kamarck & Hart, *supra* note 12.

32. In the cases on Certain Antifriction Bearings (Other Than Tapered Roller Bearings), petitioner argued that all antifriction bearings, except tapered roller bearings, constituted one class or kind of merchandise. In that investigation, Commerce determined that the antifriction bearings described in the petition constituted five separate classes or kinds of merchandise. Thus, a separate dumping margin was calculated for each of the five classes or kinds of merchandise. See 54 Fed. Reg. 18,992-19,137 (Dep't Comm. 1989) (final); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19 & 20, 731-TA-391 to -399 (May 1989) (final) (views of Comm'rs Eckes, Lodwick, Rohr, and Newquist).

33. Section 771(10) of the Tariff Act, *as amended* by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101(10), 93 Stat. 176 (codified as amended at 19 U.S.C. § 1677).

34. See, e.g., Certain Valve, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems, USITC Pub. 1649, Inv. No. 731-TA-165 (Feb. 1985) (final), where the ITC found seven like products even though Commerce had found only one class or kind of merchandise.

kind determination, as they often do, then the scope of any resulting order will correspond to the class or kind of merchandise covered by the Commerce investigation.<sup>35</sup> If, however, the ITC finds that the class or kind of merchandise constitutes more than one like product, and if the ITC does not make an affirmative injury determination on each like product,<sup>36</sup> the scope of any resulting order is truncated to include only those like products determined to be causing or threatening injury.<sup>37</sup>

While it is clear that the nature of each agency's statutory obligations has precipitated (and will continue to precipitate) divergent decisions on class or kind and like product, the history of their relationship during investigations is probably not a good barometer for predicting their relationship in post-order anticircumvention decisions. First, unlike investigations where both agencies are decision-makers, in anticircumvention proceedings, Commerce has the decision-making authority and the ITC has only an advisory role. Furthermore, the legislative history is clear that the ITC should only provide advice when there is a major injury question (i.e., whether the product subject to an order and the product proposed for inclusion constitute separate like products, thus requiring an injury determination). Because of these differences, and because the ITC has not yet been notified by Commerce of any proposed inclusions,<sup>38</sup> it is not possible to predict what the interface between Commerce and the ITC will be in anticircumvention decisions. Judging by their history, however, it is safe to assume that both agencies will take their responsibilities very seriously in these

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In a separate injury determination for each of the like products, the ITC found injury to the U.S. industry in five of the seven cases. For a similar situation, see *Certain Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, and the Netherlands*, USITC Pub. 1956, Inv. Nos. 701-TA-275 to -278 (March 1987) (final), where Commerce determined that flowers imported from various countries were the same class or kind of merchandise, whereas the ITC found each type of flower represented a separate like product. See generally Kamarck & Harr, *supra* note 12, at 22-23.

35. See, e.g., *Erasable Programmable Read Only Memories from Japan*, USITC Pub. 1927, Inv. No. 731-TA-288 (Dec. 1986) (final); *Certain Electrical Conductor Redraw Rod from Venezuela*, USITC Pub. 2103, Inv. Nos. 701-TA-287, 731-TA-378 (August 1988) (final).

36. See, e.g., *Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany*, USITC Pub. 2194, Inv. Nos. 701-TA-293, 731-TA-391 to -399 (June 1989) (final), 54 Fed. Reg. 15,481 (Dep't Comm. 1989) (final); *Certain Fresh Cut Flowers from Canada*, *supra* note 34; *Live Swine and Pork from Canada*, USITC Pub. 1733, Inv. No. 701-TA-224 (July 1985) (final); *Certain Valves, Nozzles, and Connectors of Brass from Italy*, *supra* note 34.

37. In certain cases, the ITC like product is more broadly defined than the scope of the Commerce investigation. In *Generic Cephalexin Capsules from Canada*, Commerce examined whether imports of generic cephalexin were sold at less than fair value; however, the ITC included in its like product definition both generic and brand-name cephalexin capsules, thus expanding the scope of its injury investigation to include both generic and brand-name producers. In its final determination on *Generic Cephalexin Capsules from Canada*, the ITC found that the U.S. industry producing the like product was not injured. USITC Pub. 2211, Inv. No. 731-TA-423 (August 1989) (final).

38. See *infra* notes 39, 46, 53 and accompanying text.

proceedings. Indeed, this is already evidenced in the Commerce records of those cases in which anticircumvention issues are being examined.

### III. Application of Anticircumvention Measures

Not surprisingly, since the passage of the 1988 Trade Act, U.S. petitioners have made a number of allegations to Commerce that foreign competitors are circumventing orders. Between January and August 1989, Commerce received five requests (covering six orders)<sup>39</sup> to conduct an anticircumvention inquiry.<sup>40</sup> Each request was made pursuant to a specific section of the anticircumvention provision, and included information on the conditions and factors that must be weighed by Commerce in making an anticircumvention decision. Commerce initiated an inquiry into four of the allegations.<sup>41</sup>

Of the four inquiries underway, two—*Certain Forklift Trucks from Japan* (*Forklifts*) and *Brass Sheet and Strip from Korea*—are being handled pursuant to section 781(a), completion or assembly of merchandise in the United States. The two others—*Brass Sheet and Strip from the Federal Republic of Germany* (*German Brass Sheet and Strip*) and *Certain Electrical Conductor Redraw Rod from Venezuela* (*Redraw Rod*)—are being handled pursuant to section 781(c), minor alterations of merchandise. These allegations were submitted before regulations governing anticircumvention inquiries had been published.<sup>42</sup> In the meantime, Commerce's practice in handling these allegations has been as follows.

Commerce reviews any formal allegation that an order is being circumvented for sufficiency (based on the requirements set forth in section 781), much as it does a petition to initiate an investigation. If the allegation is sufficient, a

39. Information on the allegations of circumvention and the Department's actions through July 1989 was obtained from the public files maintained on these cases in the Central Records Unit of Import Administration, Rm. B-099, U.S. Department of Commerce. The relevant Department of Commerce case file numbers are: *Certain Internal Combustion Industrial Forklift Trucks from Japan* (A-588-703), *Brass Sheet and Strip from the Federal Republic of Germany* (A-428-602), *Brass Sheet and Strip from the Republic of Korea* (A-580-603), *Certain Electrical Conductor Redraw Rod from Venezuela* (A-307-701 and C-307-702), and *Portable Electric Typewriters from Japan* (PETs) (A-588-087). The request on *Certain Electrical Conductor Redraw Rod from Venezuela* targets both the AD and CVD orders.

40. In addition, Commerce has received one request from foreign producers and U.S. importers who are subject to an order on Japanese televisions to exclude certain liquid crystal display TVs (A-588-015) from the scope of the order under the criteria set forth in section 781(d) on later-developed merchandise. Tariff Act, as amended by the 1988 Trade Act, § 1321, 102 Stat. 1193-94 (codified as amended at 19 U.S.C. § 1677).

41. With respect to the fifth request concerning anticircumvention of the order on PETs from Japan, Commerce has declined to pursue an inquiry until the completion of the Japanese respondents' appeal of a Court of International Trade decision that Commerce erred in its decision to exclude from the scope of the order portable electric typewriters with memory and calculator functions. See *supra* note 20; Letter from David P. Mueller, Division Director, Antidumping Duty Compliance, Dep't Comm. to Eugene L. Stewart (June 29, 1989) (Dep't Comm. file No. A-588-087).

42. As of the writing of this article, Commerce has yet to publish regulations.

memorandum is prepared recommending an inquiry. If approved by the Assistant Secretary for Import Administration, an inquiry is begun. Commerce does not publish this "initiation" in the *Federal Register*, but advises all interested parties of the inquiry by letter, sends a questionnaire to the foreign producers and, if necessary, the U.S. importers. Responses are generally due within thirty days.

Among these four inquiries, there does appear to be one inconsistency in Commerce's procedures. In *German Brass Sheet and Strip*, Commerce ordered the Customs Service to suspend liquidation, at a zero duty deposit rate, of imports of the products that the petitioner alleged should be covered by the order.<sup>43</sup> In the other anticircumvention inquiries, Customs has not been directed to suspend liquidation. When Commerce made scope rulings prior to the passage of the anticircumvention amendments in the 1988 Trade Act, it did order, in certain cases, suspension of liquidation of the merchandise being examined (at a zero duty deposit rate).<sup>44</sup> What authority Commerce has to suspend liquidation under the anticircumvention provisions is unclear, although the Conference Report states that the anticircumvention measures are not intended to call into question past authority of Commerce to make scope decisions.<sup>45</sup>

As of August 1989, Commerce had received questionnaire responses in all but one case and in some instances had sent out supplemental and deficiency questionnaires; however, no decisions had been announced. Before making a final decision, Commerce likely will render a preliminary determination as to whether the merchandise in question is properly included within the scope of the existing order. If it specifies that the merchandise in question should be included, then the preliminary determination will, in all likelihood, serve as the vehicle to notify the ITC officially of the proposed inclusion as required by section 781(e).<sup>46</sup>

Beyond the procedural aspects of these cases, in all probability, the most problematic issues that Commerce will have to tackle in making anticircumvention decisions include:

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43. Suspension of liquidation means that Customs will not liquidate (i.e., clear) the paperwork that must be completed for all imports. When Commerce issues an affirmative preliminary determination, it directs Customs to suspend liquidation of entries of the merchandise covered by the investigation and to require importers to post a cash deposit or bond equal to the ad valorem subsidy or dumping rate. If an order is ultimately issued, Commerce orders Customs to continue the suspension of liquidation, but to require importers to post a cash deposit only equal to the final determination rate(s). See section 733(d) of the Tariff Act, *as amended by the Trade Agreements Act of 1979*, § 101, 93 Stat. 163 (codified as amended at 19 U.S.C. § 1673(b)).

44. See, e.g., *Color Televisions from Korea* (Dep't Comm. File No. A-580-008). Prior to issuing a scope ruling under this order, Commerce ordered a suspension of liquidation of the merchandise in question at a zero duty deposit rate.

45. CONFERENCE REPORT, *supra* note 3, at 601.

46. Tariff Act, *as amended by the 1988 Trade Act*, § 1321, 102 Stat. 1194-95 (codified as amended at 19 U.S.C. § 1677j). When it initiated its anticircumvention inquiry in the *Forklifts* case, Commerce advised the ITC of the initiation by letter. However, Commerce stressed that the letter was not to be construed as official notification to the ITC under the requirements of section 781(e). See *supra* note 39.

- (i) what constitutes completion and assembly;<sup>47</sup>
- (ii) what is the definition of a part or component;<sup>48</sup>
- (iii) what constitutes "small," and how should the value of the components and the merchandise sold in the United States be determined;<sup>49</sup>
- (iv) what is the threshold, if any, when examining the increase in imports under sections 781(a) and (b);<sup>50</sup>
- (v) what is meant by the pattern of trade in sections 781(a) and (b); and
- (vi) what constitutes a "minor" alteration in the form or appearance of the merchandise.<sup>51</sup>

Absent specific case precedent, Commerce will have to rely on the legislative history for guidance in deciding these issues. Yet the legislative history provides sparse guidance on the specifics.<sup>52</sup> Undoubtedly, Commerce will also rely heavily on its prior experience in making scope rulings in rendering decisions under section 781.

While these issues are significant, perhaps of more significance are the arguments made by respondents that the U.S. industry's allegations are an attempt to avoid a legitimate injury determination on the products alleged to be circumventing the scope of the order.<sup>53</sup> The basic reasoning behind these arguments is:

- (i) the U.S. industry may have chosen not to include certain products in its original petition—even though there were imports of these products—because it thought that its injury case would be weakened; and
- (ii) now that an order has been issued, the U.S. industry may be using the anticircumvention provision to try to include, in the scope of the order, those same products that had not been included in the original petition,

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47. This issue has arisen in *Brass Sheet and Strip from Korea*, *supra* note 39.

48. *Id.*

49. These issues have arisen in *Forklifts* and *Brass Sheet and Strip from Korea*, *supra* note 39.

50. *Redraw Rod* and *German Brass Sheet and Strip* are being examined under the minor alterations measure, which does not include a provision to consider the increase in imports of the altered merchandise. Nonetheless, the petitioners included in their submissions an analysis of the import trends. For example, in *Redraw Rod* petitioner provided statistics indicating a decrease in redraw rod imports with a corollary increase in imports of the allegedly altered merchandise. *See supra* note 39.

51. This issue has been raised in *Redraw Rod* and *German Brass Sheet and Strip*, *supra* note 39.

52. *See, e.g.*, H.R. REP., *supra* note 7, at 135, which states that the presumption of coverage in the minor alterations provision "is not disposed of solely because the altered product is classified under a different tariff category than the unaltered product." *See also* S. REP., *supra* note 8, at 100, which states in the discussion on U.S. and third country completion or assembly of parts and components that, "the Committee has not attempted to develop a precise meaning for the term 'small' as used in these sections, . . . . The Committee does not, however, intend that the term 'small' be interpreted as insignificant."

53. *See, e.g.*, letters submitted by respondents in the *German Brass Sheet and Strip* case (from Richard Johnson to Holly Kuga, Feb. 27, 1989) (Dep't Comm. File No. A-428-602) ) and in the *Redraw Rod* case (from Patrick F. J. MacCrory to Secretary Mosbacher) (June 26, 1989) (Dep't Comm. File Nos. A-307-701, C-307-702) ). *See supra* note 39.

thereby "circumventing," in effect, the requirement for an injury determination on a different like product than that which is covered by the order.

Whether, and to what extent, Commerce and the ITC will take these arguments into consideration in discharging their responsibilities under the anticircumvention provision remains to be seen, but it is the injury aspect of these proceedings that may prevent a shifting of the gears of the antidumping and countervailing duty laws.

#### **IV. Implications and Significance of the Anticircumvention Provisions**

One of the primary goals of the Administration during the development of the amendments to the antidumping and countervailing duty laws was to ensure that the measures did not violate U.S. international obligations<sup>54</sup> under the GATT, including the Antidumping Code<sup>55</sup> and the Subsidies Code.<sup>56</sup> In the end, the Administration succeeded in obtaining the elimination of the amendments it considered most egregious. With respect to anticircumvention, all sides fully supported a strong and effective measure, but, in conference, they agreed that the original provisions needed to be tempered to ensure consistency with U.S. international obligations.<sup>57</sup>

Under the Antidumping Code, duties can be assessed only in the face of both a finding that imports of a like product are sold at less than "normal" (in U.S. antidumping law, "fair") value, and a finding that a domestic industry producing a product "like" the imported product is injured by reason of the dumped imports.<sup>58</sup> Under the Subsidies Code, countervailing duties can be assessed only where there is both a finding of subsidization and injury.<sup>59</sup> Because the U.S. anticircumvention measures are intended to examine whether a product should properly be included in the class or kind of merchandise covered by the scope of an order, and because the class or kind of merchandise determination is inextricably linked with the like product determination, the anticircumvention provision authorizes an advisory role for the ITC in order to safeguard against a violation of U.S. international obligations. So long as the ITC does not advise Commerce of an injury problem in the proposed inclusion of products found to be circumventing the existing order, then no question should arise of a violation of U.S. international obligations.

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54. *Hearings on H. R. 3*, *supra* note 16, at 656 (Statement of Alan F. Holmer, General Counsel, Office of the U.S. Trade Representative).

55. Antidumping Code, *supra* note 28.

56. Subsidies Code, *supra* notes 5, 28.

57. CONFERENCE REPORT, *supra* note 3, at 602.

58. Antidumping Code, *supra* note 28.

59. Subsidies Code, *supra* notes 5, 28.

But what happens when the ITC finds a significant injury problem in the proposed inclusion of a product in the scope of an order? Under the Act, Commerce is required only to "take into account" the advice of the ITC in making its decision.<sup>60</sup> Although Commerce is unlikely to ignore written advice from the ITC that a significant injury question is posed by a proposed inclusion, Commerce has sole authority for circumvention decisions.

As with scope rulings, Commerce's final decision to include (or exclude) a product pursuant to section 781 is subject to judicial review.<sup>61</sup> Thus, even if Commerce ignored the ITC's advice and decided to include a product on which the ITC raised a significant injury question, the adversely affected party could sue in the Court of International Trade. Moreover, because of the injury question, the government of an adversely affected foreign producer could pursue this issue in the GATT, Antidumping Code, or Subsidies Code.

The experience of the European Community in enforcing its anticircumvention measure may be instructive in anticipating and avoiding potential GATT problems for U.S. anticircumvention decisions. In June 1987, the European Community (EC) adopted an anticircumvention measure under its antidumping duty law.<sup>62</sup> The intent of the measure was to prevent foreign companies from circumventing antidumping duties by importing components of the merchandise subject to antidumping duties and assembling them at "screwdriver-type" assembly plants in the Community.<sup>63</sup> Although the EC provision is not as broad

60. Sections 781(a), (b), (d) of the Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1192-94 (codified as amended at 19 U.S.C. § 1677j).

61. The right to judicial review of final anticircumvention decisions is not specifically authorized in section 781. However, judicial review of Commerce's scope rulings was authorized in the 1979 amendments to the Tariff Act under section 516A, *as amended* by the Trade Agreements Act of 1979, § 1001, 93 Stat. 300 (codified as amended at 19 U.S.C. § 1516a). Since the anticircumvention provisions, in effect, codify certain categories of scope rulings, judicial review of anticircumvention decisions is presumptively authorized. We note, however, that the Tariff Act does specifically prohibit judicial review of one decision that must be made during the course of the anticircumvention proceeding. Section 781(e) (1) states: "Notwithstanding any other provision of law, a decision by the administering authority regarding whether any merchandise is within a category for which notice is required under this paragraph is not subject to judicial review." Tariff Act, *as amended* by the 1988 Trade Act, § 1321, 102 Stat. 1194 (codified as amended at 19 U.S.C. § 1677j).

Thus, judicial review is prohibited at the point when Commerce decides under which of the four anticircumvention categories a product will be examined. The requirement to notify the ITC is dependent on this Commerce decision. Since this categorization must, of necessity, be made prior to the final decision on whether to include a product, the prohibition on judicial review of this classification prevents the anticircumvention proceedings from being disrupted prior to a final decision, much like the prohibition on judicial review of decisions made by Commerce during the course of an antidumping or countervailing duty investigation, but prior to a final determination in (or a determination which terminates) an AD or CVD investigation.

62. Council Regulation (EEC) No. 1761/87, 30 O.J. EUR. COMM. (No. L 167) 9 (1987) [hereinafter Council Regulation], amended Council Regulation (EEC) No. 2176/84 on protection against dumped or subsidized imports from countries not members of the European Economic Community, 27 O.J. EUR. COMM. (No. L 201) 1 (1984), by adding a new paragraph 10 to article 13.

63. Van Gerven, *New Anti-Circumvention Rules in EEC Anti-Dumping Law*, 22 INT'L LAW. 809 (1988).

in scope as the subsequently enacted U.S. provisions,<sup>64</sup> its application to assembly plants is substantially more far-reaching. Under the EC regulation, antidumping duties may be imposed on the components if:

- (i) the assembly operation is related to the foreign producer of the merchandise subject to antidumping duties,
- (ii) the assembly operation was started or substantially increased after the opening of the antidumping investigation, and
- (iii) the value of the components from the country subject to an order exceeds the value of all other parts and materials used by at least 50 percent.

Factors that the EC is to consider in making the decision include the variable costs incurred in the assembly operation, the research and development carried out, and the technology applied within the EC.<sup>65</sup> Since the issuance of the new EC anticircumvention regulation, at least six investigations of Japanese imports of parts and components of products subject to EC antidumping duties have been undertaken.<sup>66</sup>

In 1988, the government of Japan requested the establishment of a panel of experts under article XXIII of the GATT, alleging that the EC anticircumvention measures violated the EC's international obligations under the GATT. In October 1988, a panel was established to consider Japan's allegations under agreed terms of reference. Hearings were held by the panel in late July 1989. As of the writing of this article, no decision had been rendered.

The issues raised by the Japanese GATT case are not directly applicable to U.S. anticircumvention measures, which are modest relative to the EC measure.

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64. The EC Regulation does not include third country, minor alteration, or later-developed merchandise provisions. Council Regulation, *supra* note 62.

65. *Id.*

66. In three of the investigations, the Council extended the prior antidumping duty to the parts and components assembled within the EEC to certain foreign manufacturers, whereas for the remaining foreign manufacturers, the Commission terminated the investigation. *See* Council Regulation (EEC) No. 1022/88, 31 O.J. EUR. COMM. (No. L 101) 4 (04/20/1988) (extending the antidumping duty imposed by Regulation (EEC) No. 1698/85 to certain electronic typewriters assembled in the Community); Council Regulation (EEC) No. 1021/88, 31 O.J. EUR. COMM. (No. L 101) 1 (04/20/1988) (extending the antidumping duty imposed by Regulation (EEC) No. 1058/86 to certain electronic scales assembled in the Community); Council Regulation (EEC) No. 3205/88, 31 O.J. EUR. COMM. (No. L 284) 36 (10/19/1988) (extending the antidumping duty imposed by Regulation (EEC) No. 535/87 to certain plain paper photocopiers assembled in the Community); Commission Decision (EEC), 31 O. J. EUR. COMM. (No. L 101) 26 (04/20/1988); Commission Decision (EEC), 31 O. J. EUR. COMM. (No. L 101) 27 (04/20/1988); Commission Decision (EEC), 31 O. J. EUR. COMM. (No. 284) 60 (10/19/1988).

In two cases, the Commission terminated the anticircumvention investigations. Commission Decision (EEC), 31 O. J. EUR. COMM. (No. L 101) 24 (04/20/1988) (certain hydraulic excavators assembled in the Community); Commission Decision (EEC), 32 O. J. EUR. COMM. (No. 25) 90 (01/28/1989) (certain ball bearings assembled in the Community). In the sixth case, the Commission has decided to initiate an investigation. Notice of initiation of an antidumping proceeding pursuant to article 13(10) of Council Regulation (EEC) No. 2423/88 concerning video cassette recorders assembled in the Community, 32 O. J. EUR. COMM. (No. C 172) 2 (07/07/1989).



Yet, the fact that the Government of Japan, for the *first* time since it became a GATT member in 1963, decided to take this issue to GATT dispute settlement under article XXIII:2 indicates that foreign competitors adversely affected by U.S. anticircumvention rulings are likely to pursue every avenue to appeal the decision.

At least the first two U.S. anticircumvention provisions (U.S. and third-country assembly operations), as well as the EC anticircumvention regulation, relate directly to the broader issue of determining the origin of a product. In making their anticircumvention decisions, both Commerce and the EC will be establishing criteria to determine the origin of a product. In the global marketplace, rules of origin have become increasingly important.<sup>67</sup> What impact the anticircumvention decisions might have on the multilateral establishment of rules of origin remains to be seen.

Another broader concern that has been raised in the context of the EC anticircumvention measure is the dampening effect these decisions may have on foreign investment.<sup>68</sup> Foreign companies considering an investment in production facilities in the EC (or the United States) will have to take into account that they may not only be subject to antidumping and countervailing duties on imports of the finished merchandise, but also to antidumping (and in the United States, countervailing) duties on parts and components assembled in the EC or the United States.

The U.S. anticircumvention provisions clearly have the potential to make the antidumping and countervailing duty laws more effective at less cost to U.S. industry. Even though the initial allegations are still pending, however, already some doubt has emerged about whether the 1988 amendments go far enough. A bill was introduced in the Senate in June 1989 requiring Commerce to decide whether to undertake an anticircumvention inquiry within twenty days of receiving a "petition," and to complete the inquiry within 120 days of commencement.<sup>69</sup> The bill further stipulates that Commerce may order suspension of liquidation of the affected merchandise at any time during the investigation. While no action has been taken on this bill, it expresses the desire that the Administration provide quick and effective action in anticircumvention proceedings.

Today's global economy is characterized by the adaptability and internationalization of distribution and supply networks and production facilities. These days, companies can shift gears relatively rapidly to adapt trade and production activities to not only commercial realities, but also trade law and policy developments that affect their bottom line.

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67. Bello & Holmer, *The Growing Importance of Rules of Origin*, MGMT. REV. (1990) (forthcoming).

68. See Van Gerven, *supra* note 63, at 811, 827-28.

69. S. 1204, 101st Cong., 1st Sess. § 8 (1989).

The anticircumvention measures were put in place to respond effectively to a foreign company's shifts in patterns of trade and production. If the potential roadblocks to implementation can be avoided or surmounted, these measures can certainly grease the gears of the antidumping and countervailing duty laws so that they can keep pace with a rapidly changing global marketplace. To remain consistent with the international obligations of the United States, however, they are unlikely to more dramatically shift those gears.